Supreme Court, U.S
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No. 04-575

In The
Supreme Court of the United States

DIANNE R. NIELSON, in her official capacity as Executive Director of the Utah Department of Environmental Quality, *et al.*,

Petitioners,

v.

PRIVATE FUEL STORAGE, L.L.C., and SKULL VALLEY BAND OF GOSHUTE INDIANS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit properly found that the Respondents' challenge to Utah's statutory scheme was ripe for review and preempted as violating the Supremacy Clause of the United States Constitution.

CORPORATE DISCLOSURE STATEMENT

Please see the Corporate Disclosure Statement of the Brief of Appellees in the action below. (Appellees' Br. at 1).

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STATEMENT OF THE CASE

Private Fuel Storage, L.L.C. ("PFS") was created to solve the problem of temporary storage of spent nuclear fuel ("SNF"). The Skull Valley Band of Goshute Indians (the "Band") is a federally recognized tribe, with a reservation within the State of Utah set aside pursuant to an 1863 treaty with the United States. PFS entered into a lease agreement with the Band pursuant to 25 U.S.C. § 415 to allow PFS to license, construct and operate a facility for the temporary storage of SNF on tribal lands (the "project") while the Federal Government licenses and builds a national, permanent repository for SNF and high-level radioactive waste. The executive and legislative branches of the State of Utah (the "State") oppose the project. That opposition has been vociferous and constant from the date the project was first announced.

Petitioners have consistently opposed the licensing of the project before the Nuclear Regulatory Commission ("NRC"), before other federal agencies, in public pronouncements, and in a legislative effort which culminated in the passage of an unconstitutional statutory scheme containing an explicit ban against the temporary storage of SNF in Utah. That scheme explicitly opposes the project, notwithstanding the federal license-requirement status, tribal sovereignty, and a tribal lease that is subject to the exclusive regulatory authority of the Secretary of the Interior. The statutory scheme alternatively establishes Utah as a second nuclear regulatory authority with safety requirements over and above those of the NRC that essentially serve as a ban.

Respondents take issue with the way Petitioners are now recasting the statutory scheme, straining for a constitutional

statement or phrase somewhere within the scheme. Petitioners' current retreat from the clear language of these statutes (Pet. 6) should not mislead this Court.

The statutory scheme has two main attacks on PFS and the Band. First, it purports to ban the temporary storage of SNF, in derogation of the federal licensing process, tribal sovereignty, and a tribal lease, which is subject to the exclusive regulatory authority of the Secretary of the Interior. Second, it purports to establish an alternative regulatory process. Both approaches are preempted by federal law.

The statutory scheme articulates an outright ban to the placement of high-level nuclear waste in Utah by providing: "The state of Utah enacts this part to prevent the placement of any high-level nuclear waste . . . in Utah." App. 101a. Then, recognizing that the outright ban may not withstand scrutiny the scheme continues: "The state also recognizes that high-level nuclear waste . . . may be placed within the exterior boundaries of the state, pursuant to a license from the federal government, or by the federal government itself, in violation of this state law." *Id.*

In recognition of this eventuality, the scheme establishes Utah as a secondary nuclear regulatory authority by providing the following:

> Due to this possibility, the state also enacts provisions in this part to regulate transportation, transfer, storage, decay in storage, treatment, and disposal of any high-level nuclear waste . . . in Utah, thereby asserting and protecting the state's interests . . . should the federal government decide

> to authorize any entity to operate, or operate itself, in violation of this state law.

Id. at 101a-02a. Furthermore, the statutory scheme on its face underscores the State's intent to regulate the federally preempted field of nuclear safety concerns. This is clearly demonstrated by the scheme's section that provides:

> Any contract or agreement to provide any goods, services, or municipal-type services to any organization engaging in, or attempting to engage in the placement of high-level nuclear waste . . . at a storage facility or transfer facility within the state are declared to be against the greater public interest, health, and welfare of the state, by promoting an activity which has the great potential to cause extreme public harm.

Id. at 98a-99a.

The goals of health and safety from nuclear hazards are woven throughout the statutory scheme, but Petitioners attempt to distance themselves from this reality because they know they have invaded the federal regulatory arena which fully occupies the field of nuclear safety.

Moreover, even though Respondents have suffered injury from the statutes, Petitioners continue to argue that Respondents' claims are not ripe. However, Petitioners fail to give the Court any reason that justifies review.

Accordingly, on August 4, 2004, the United States Court of Appeals for the Tenth Circuit properly affirmed the District Court's ruling that the statutes are preempted by federal law.

SUMMARY OF ARGUMENT

Petitioners do not provide a compelling reason for granting a writ of certiorari. Petitioners make no persuasive showing that any of the reasons considered by this Court are present in this case. Specifically, the Petitioners provide no convincing argument that (a) the Tenth Circuit decision is in conflict with other circuits; (b) the Tenth Circuit decision has so far departed from the accepted and usual course of judicial proceedings that review by this Court is necessary; (c) the Tenth Circuit has decided an important question of federal law that has not been settled by this Court; or (d) the Tenth Circuit decision conflicts with decisions of this Court. Sup. Ct. R. 10.

In fact, even though Petitioners argue that this case is not ripe for review, Petitioners do not articulate any reason for granting the petition on this issue. Instead Petitioners attempt to mislead the Court with an argument based purely on the merits.

As with their ripeness argument, Petitioners' preemption argument is based primarily on the merits. It is only at the end of their brief that Petitioners provide any reason for review by this Court, making a half-hearted attempt to argue that the Tenth Circuit's preemption decision is in conflict with other circuits.

Respondents maintain that review by this Court is not necessary because the decision of the Tenth Circuit is consistent with the rulings of this Court as well as those of the other circuits, and no other reason for this Court's review is present. The Tenth Circuit analyzed *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983) and *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and, consistent